



LMM 8/1/01 13:21

3:01-CV-01206 BANC OF AMERICA V. APOLLO FISHERIES

\*18\*

\*OPPM.\*

1 JEFFRY A. DAVIS (Bar No. 103299)  
EVAN R. SOREM (Bar No. 185588)  
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01 AUG -1 AM 9:10

*R. Michael*  
DEPUTY

5 Attorneys for Defendants  
6 Apollo Fisheries Service, Inc., dba Blue  
7 Porpoise Marine

8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10  
11 BANC OF AMERICA SPECIALITY  
12 FINANCE, INC., a North  
13 Carolina Corporation,  
14 successor-in-interest and  
15 formerly known as  
16 NATIONSCREDIT COMMERCIAL  
17 CORPORATION OF AMERICA,

18 Plaintiff,

19 v.

20 APOLLO FISHERIES SERVICE,  
21 INC. dba BLUE PORPOISE  
22 MARINE; NATALIE CINTAS-  
23 GLADNICK, an individual, and  
24 RONALD GLADNICK, an  
25 individual,

26 Defendants.

CASE NO. 01 CV 1206 BTM (LSP)

OPPOSITION TO PLAINTIFF BANC OF  
AMERICA SPECIALTY FINANCE, INC.'S  
APPLICATION FOR EX PARTE WRIT OF  
POSSESSION AND TEMPORARY  
RESTRAINING ORDER

Date: TBA

Time: TBA

Courtroom: 15

Honorable Barry T. Moskowitz

27 Defendant Apollo Fisheries Service, Inc., dba Blue Porpoise  
28 Marine ("Blue Porpoise"), hereby files this opposition  
29 ("Opposition") to Plaintiff Banc of America Specialty Finance,  
30 Inc.'s ("Specialty Finance") Application for Ex Parte Writ of  
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1 Possession and Temporary Restraining Order (the "Ex Parte  
2 Application").

3 I.

4 **THERE IS NO EMERGENCY JUSTIFYING EX PARTE**  
5 **RELIEF**

6 By the Ex Parte Application, Specialty Finance seeks a writ  
7 of possession permitting the U.S. Marshal to take possession of  
8 certain Collateral, a temporary restraining order prohibiting  
9 Blue Porpoise from disposing of the Collateral pending levy upon  
10 the writ of possession, and a turnover order requiring that Blue  
11 Porpoise turn over the Collateral to Specialty Finance.<sup>1</sup>  
12 Specialty Finance indicates that this relief is needed on an  
13 ex parte basis because of "alleged facts" that Blue Porpoise is  
14 suffering from significant financial problems, Blue Porpoise sold  
15 Specialty Finance Collateral Out of Trust, Blue Porpoise may have  
16 utilized funds received from the sale of certain boat and engine  
17 collateral to pay other debts, and the Collateral is products  
18 that may be moved or concealed. None of the foregoing is  
19 correct.

20 First, while Blue Porpoise is suffering from some financial  
21 difficulty, Blue Porpoise has paid Specialty Finance in excess of  
22 \$940,000 from the sale of Collateral since January 2000. A true  
23 and correct copy of the Blue Porpoise Quickbooks report showing  
24 such payments is attached as Exhibit A to the Declaration of  
25 Natalie Cintas-Gladnick (the "Gladnick Declaration") in Support

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26  
27 <sup>1</sup> All capitalized terms not defined herein shall have the meaning set  
28 forth in the Memorandum of Points and Authorities in Support of the  
Ex Parte Application.

1 of the Opposition, filed contemporaneously herewith. Second,  
2 Blue Porpoise has not sold any of Specialty Finance's Collateral  
3 Out of Trust. Rather, Blue Porpoise has consistently indicated  
4 to Specialty Finance that the approximately \$98,080 in proceeds  
5 from the sale of Specialty Finance's Collateral would be remitted  
6 to Specialty Finance at the earliest possible time. Blue  
7 Porpoise has every intent of remitting this payment to Specialty  
8 Finance provided that Blue Porpoise obtains adequate assurances  
9 from Specialty Finance that Specialty Finance will forbear from  
10 any further pre-judgment collection activities. Blue Porpoise  
11 has segregated these funds and stands prepared to forward the  
12 funds to Specialty Finance at once. Third, Blue Porpoise has not  
13 utilized funds received from the sale of Specialty Finance's  
14 Collateral to pay other debts. Accordingly, the "alleged facts"  
15 set forth by Specialty Finance to support the relief sought by  
16 the Ex Parte Application do not exist. This Court should deny  
17 the relief sought by the Ex Parte Application on this basis.

18 Also, in the Ex Parte Application, Specialty Finance urges  
19 the Court to, at a minimum, grant a temporary restraining order,  
20 restraining Blue Porpoise from transferring, dissipating,  
21 disposing of or damaging any of the Collateral. Specialty  
22 Finance uses the same "alleged facts" to support this prayer for  
23 relief. Again, there is no reason to enter a temporary  
24 restraining order as there is no danger that Blue Porpoise will  
25 transfer, dissipate, dispose of or damage any of the Collateral  
26 without appropriately remitting or reserving the funds due to  
27 Specialty Finance. For the past eighteen months, Blue Porpoise  
28 has paid and continues to have every intent of paying the full

1 amount owing to Specialty Finance through sale of the Collateral  
2 and remittance of the funds directly to Specialty Finance.

3 II.

4 BLUE PORPOISE HAS JUST SIX ITEMS OF  
5 COLLATERAL IN ITS POSSESSION

6 In the Ex Parte Application, Specialty Finance indicates  
7 that there are at least nine items of Collateral in the  
8 possession of Blue Porpoise that Specialty Finance would like  
9 returned. Attached as Exhibit B to the Gladnick Declaration is  
10 an Inventory Checklist of the items of Collateral still held by  
11 Blue Porpoise. The first six items on the checklist are the  
12 items of Collateral still in Blue Porpoise's possession; the  
13 remaining three were sold to generate the \$98,080 in proceeds  
14 referenced above. Therefore, Blue Porpoise has just six items of  
15 Collateral remaining in its possession at this time.

16 In addition, the second and third entries on the Inventory  
17 Checklist, those bearing serial numbers NTLAD-675C and 10-1201,  
18 are the subject of a pending sale by Blue Porpoise to a third  
19 party. Blue Porpoise will ensure that the proceeds from this  
20 sale are remitted directly to Specialty Finance provided that  
21 Blue Porpoise receives adequate assurances from Specialty Finance  
22 that Specialty Finance will forbear any further prejudgment  
23 collection activities. Blue Porpoise will segregate the funds  
24 received from the sale of these items and will stand prepared to  
25 forward the funds to Specialty Finance at once.

26 Once this sale is complete, Blue Porpoise will hold just  
27 four items of unsold Collateral, two boats and two engines. For  
28 this Collateral, Blue Porpoise will owe Specialty Finance

1 approximately \$60,000. The reduction of the debt owing by Blue  
2 Porpoise to Specialty Finance from \$234,475.00 at the time of the  
3 complaint to just \$60,000 is persuasive evidence that the  
4 extraordinary ex parte relief sought is entirely unnecessary,  
5 burdensome and inappropriate on an ex parte basis.

6 **III.**

7 **SEVERAL LEGAL ISSUES REMAIN WHICH PRECLUDE**  
8 **THE RELIEF SOUGHT**

9 At this time there remain numerous unresolved factual issues  
10 regarding the priority and propriety of Specialty Finance's  
11 rights to the Collateral which make the ex parte relief sought  
12 inappropriate. A quick review of the records of the California  
13 Secretary of State reveals that twenty-four UCC Financing  
14 Statements have been filed against Blue Porpoise. It is unclear  
15 what priority Specialty Finance has to the Collateral relative to  
16 the other parties with UCC Financing Statements on file.  
17 Further, counsel for Blue Porpoise has not yet had an adequate  
18 opportunity to analyze Specialty Finance's claimed security  
19 interest. Absent a timely review of such issues, the court  
20 should not grant the relief sought on such short notice.

21 **IV.**


22 **CONCLUSION**

23 As a result of Blue Porpoise's substantial payments over the  
24 past eighteen months and Blue Porpoise's continuing assurances of  
25 future payments to Specialty Finance upon receipt of adequate  
26 assurances, Blue Porpoise requests that the Court deny the  
27 Ex Parte Application and stay further proceedings in the instant  
28 action for a period of ninety days, to permit Blue Porpoise  
sufficient breathing room to sell the remaining Collateral of

1 Specialty Finance and pay off all amounts owing to Specialty  
2 Finance. In addition, Blue Porpoise requests that the Court set  
3 a hearing on this matter to permit the parties an opportunity to  
4 present their positions more fully to the Court.

5 Dated: August 1, 2001

6 By



JEFFRY A. DAVIS

EVAN R. SOREM

GRAY CARY WARE & FREIDENRICH LLP

Attorneys for Defendants Apollo

Fisheries Service, Inc., dba

Blue Porpoise Marine

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5 Attorneys for Defendants

Apollo Fisheries Service, Inc., dba Blue

6 Porpoise Marine, Natalie Cintas-Gladnick and

Ronald Gladnick

8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

11 BANC OF AMERICA SPECIALTY  
FINANCE, INC., a North  
12 Carolina Corporation,  
successor-in-interest and  
13 formerly known as  
NATIONSCREDIT COMMERCIAL  
14 CORPORATION OF AMERICA,

15 Plaintiff,

16 v.

17 APOLLO FISHERIES SERVICE,  
INC. dba BLUE PORPOISE  
18 MARINE; NATALIE CINTAS-  
GLADNICK, an individual, and  
19 RONALD GLADNICK, an  
individual,

20 Defendants.  
21

CASE NO. 01 CV 1206 BTM (LSP)

**PROOF OF SERVICE**

23 I am a resident of the state of California, over the age of  
eighteen years, and not a party to the within action. My  
24 business address is Gray Cary Ware & Freidenrich, 401 B Street,  
Suite 1700, San Diego, California 92101-4297. On August 1, 2001,  
25 I served the within documents:

26 **OPPOSITION TO PLAINTIFF BANC OF AMERICA SPECIALTY FINANCE,**  
27 **INC.'S APPLICATION FOR EX PARTE WRIT OF POSSESSION AND**  
**TEMPORARY RESTRAINING ORDER**





1 JEFFRY A. DAVIS (Bar No. 103299)  
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6 Porpoise Marine, Natalie Cintas-Gladnick and  
Ronald Gladnick  
7

8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10

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